

LETTER

TO THE AUTHOR

OF THE Vindication of the Ecclesiastical Commissioners, concerning the Legality of that Court.

HAVING read your pretended *Vindication of the Proceedings of the Ecclesiastical Commissioners against the Bishop of London and the Fellows of Magdalen College*, I could not forbear acquainting you with the Reasons why I remain as yet unsatisfied as to the Legality thereof, notwithstanding all that you alledge in their Justification.

I shall pass by your Introduction, and the invidious Reflections therein contain'd, upon the Church of England, with respect to their several way of exercising the Regal Power against Protestants Dissenters; and come to your first Section, which you entitle *The Legality of the Court held by his Majesty's Ecclesiastical Commissioners*.

Upon which the Question must be, *Whether or no by the Laws of the Nation, as they now stand, the King's Ecclesiastical Jurisdiction may be delegated to Commissioners?*

It is enacted by *primo Eliz. cap. 1.* That such Jurisdictions, Privileges, Superiorities and Prebeminencies Ecclesiastical and Spiritual, as by any Ecclesiastical or Spiritual Power or Authority, hath heretofore been or may be lawfully exercised or used, for the Edification of the Ecclesiastical State and Per-

sons, and for Reformation, Order or Correction of the same, and of all manner of Heresies, Errors, Schismes, Abuses, Offences, Contempts and Enormities, shall for ever by Authority of this present Parliament, be united and annexed to the Imperial Crown of this Realm.

And then follows the Branch Concerning the Queen's Assigning Commissioners to exercise Ecclesiastical Jurisdiction.

P. 6. This you say (and quote the Lord Coke's Authority for it) that it is an Act of Reinstitution, and that the Express Letter and meaning of 1st. Eliz. is to Restore to the Crown the Ancient Jurisdiction Ecclesiastical: Which that it is true in general, to wit, that the Ecclesiastical Jurisdiction of the Crown of England, had been usurp'd upon by the See of Rome, and was by this Act intended to be restor'd, I suppose no man will deny: But whether Our Kings by vertue of their Ancient Inherent and Primitive Ecclesiastical Jurisdiction, might delegate to Commissioners the Exercise thereof: Or whether Ecclesiastical Commissioners derived their Authority from His Majesty by vertue of that Act only, and not upon the score of any Prerogative in the Crown, preceding to that Act, whereby Our Kings might appoint Commissioners in such Cases, *ad libitum*, is (as I take) the single Question; upon which the validity or invalidity of the present Commission will turn.

The Supreme Ecclesiastical Jurisdiction was an Ancient Right of the Crown. But whether the Kings of this Realm by vertue of their supreme Ecclesiastical Jurisdiction could anciently grant a Commission of this Nature, may admit of a doubt.

It will be worth while to enquire, what this Supreme Ecclesiastical Jurisdiction anciently was, in order to the finding out whether such a Commission as is now issued, has any Warrant from the Common Law or not.

For the clearing of this, we must look many Ages backward, and as well as may be discovered at so great a distance, examine *What Power our Ancient Kings had in Ecclesiastical Affairs*, before such time as the Papal Usurpations wrested it from them.

It is not an expression that might drop from my Lord Coke's Pen, that will determine so weighty a point as this; especially being a Question that depends upon some Knowledge of Antiquity, which my Lord Coke was very little acquainted with. And what you call the greatest clearness in that Chapter of his, Cap. 74. appears to others very blind,

blind, and the Light that is in it, makes wretchedly against you.

He tells us that *No Commissioner by force of that Ancient Ecclesiastical Jurisdiction, could impose Fine and Imprisonment*, but he never tells us that our Kings, by Vertue of their Ancient Ecclesiastical Jurisdiction, could appoint any Commissioners.

Nor does he quote any Authoritys in the Margent of that whole Discourse, to evince wherein the *Ancient Ecclesiastical Jurisdiction* consisted; which yet he never fails to do, when he can, right or wrong.

And it may justly disparage that whole Discourse, that he tells us the Statutes of 26 H. 8. cap. 1. and of 35 H. 8. c. 3. are in force, for as much as the Statute of 1 and 2 Ph. and Mar. cap. 8. (whereby they were repealed) was it self repealed *Primo Eliz.* and consequently those Acts implicitly revived.

Than which nothing can be more false; for the Statute of *primo Eliz.* though it repeal 1 and 2 Ph. and Ma. c. 8. does yet enact that *all Laws and Statutes, &c. made void by the said Act of Repeal (1 and 2 P. and M.) and not in this present Act specially mentioned and revived, shall stand repealed and void, anything in the said Statute (of primo Eliz.) to the contrary notwithstanding.* Now the Laws of 26 H. 8. cap. 1. and 35 H. 8. cap. 3. were repealed by the 1 and 2 Ph. and Ma. and are not specially mentioned to be revived *primo Eliz.* and consequently do at this day stand repealed.

He tells us *the Branch concerning the High-Commission was Enacted out of necessity: For that all the Bishops and most of the Clergy of England being then Popish, it was necessary to raise a Commission to deprive them, that would not deprive themselves. So that, as necessity caused this Commission, it ought not to be exercised but upon necessity, for it was never intended to be a continual standing Commission. For that would prejudice all the Bishops of England in their Ecclesiastical Jurisdiction, &c.* P. 136.

What need then of an Ecclesiastical Commission at this time, now that all the Bishops and most of the Clergy of England are Protestants.

The deprivation of the Popish Clergy, he says, was the main Object of the Act.

That indeed he demonstrates clearly, and also that those Commissioners never had any Authority to Fine and Imprison; but the *Ancient Ecclesiastical Jurisdiction* he is very dark in, because he understood it not.

He labours in vain to prove the Queen *Head of the Church* by Statute-Law. For (as I have said) no Law in force declared her so.

But that she was so by the *Common-Law*, and that all our Kings *virtute officii* are and ought to be acknowledged so, I readily grant. They are the Head of the State, as well as of the Church, but are bound by the Laws of the Realm in the exercise of their Jurisdiction.

Let us consider a little what this *Legal Ecclesiastical Supremacy* anciently was, is, and ought to be.

The beginning of Popish Usurpations is as high as King *William the Conqueror's* days. Then it was the Pope apprehended the first opportunity to usurp upon the Liberties of the Crown of *England*. For the Conqueror came in with the Pope's Banner, and under it won the Battel, which got him the Garland; and therefore the Pope presumed he might lawfully pluck some Flowers from it, being partly gained by his Countenance and Blessing. Hereupon he sent two Legates into *England*, &c. but no Decree was paid, or put in Execution in his time without his Royal Assent. In his Successor *William Rufus* his time, they attempted to draw Appeals to the Court of *Rome*, but prevailed not. In the succeeding Reigns of King *Henry I.* King *Stephen*, King *Henry II.* and King *John*, Investitures of Bishops, Appeals to *Rome*, and exemption of Clerks were contended for, and with much difficulty obtained; and in King *Stephen's* time, when the Clergy were Lords Paramount, the Canon-Law got footing amongst us, and has been in part received and submitted to ever since. It was introduced by the power of the Clergy without assent of the Legislative Power of the Nation; and from that time till the Reformation, Kings and Parliaments were excluded from the enacting of Canons and Constitutions for the Government of the Church.

The Ecclesiastical Jurisdiction of the Crown was, during that time, under an Eclipse, which King *Henry the Eighth* restord to its Lustre; but because whatever he did, was undone again by Queen *Mary*, we may date the Restitution of Ecclesiastical Jurisdiction from *primo Eliz.* Which Restitution being in general terms, and relating to former usage, we cannot know by that Act what the *Ancient Jurisdiction of the Crown was in Ecclesiastical Matters*. The true notion of which, as it would dispel some Mists that Ignorance and Flattery have occasioned, so it must be fetcht from those times in which

it was genuine, unadulterated by foreign Usurpations, or modern impertinent and vain ascriptions.

Appeals to Rome were gain'd in King Stephen's time, and not till then. Therefore before his time, Appeals in Ecclesiastical Causes were to the King. But how? To the King in Person? I meet with no such thing in any little reading. Nor any footsteps of Commissioners of Delegates, till King Henry the 8th's time. But Appeals were to the King in Parliament; or, in the Language of those times, to the *Commune Concilium Regni*. Of which there are many Instances.

Investitures and Elections of Bishops were gain'd from the Crown in King Henry the 1st. and King John's time. But before their days it was not a personal Prerogative in the King to elect and invest them. For *Bishopricks* were then conferr'd by the *Carle Regis pro sua competentia*.

In like manner the Power of making Canons for the Government of the Church, and of receiving and incorporating into our Government Canons made beyond Sea by General Councils, or Councils so reputed, was in the Crown, as was the Power of making Temporal Laws for the Government of the State. But how to be exercis'd? In an Arbitrary despotick manner? No, but with the concurrence of the Great Council of the Realm: And by that Authority were all the Laws made in those days for the Government both of Church and State.

Those Ecclesiastical Laws thus made, were administred by the Bishops and others having Ecclesiastical Jurisdiction, and before the entrance of the Normans in the Hundred and County Courts, and at the Turnes, where the Bishop and the Earl sat together. And in the Conquerour's days, since in the Bishops Courts, who by a Law in his Reign were impowred to hold their Courts apart from the Laity.

But no Ecclesiastical Jurisdiction was ever delegated to Commissioners. Records of those times are lost in a great and deplorable measure. But many Histories, and all written by Church-men, are silent, which could not have fail'd giving some hint thereof, if any such thing had ever been.

Now if no such Commission was ever granted till the Reformation, then was that Branch of *Prima Rota* which sets up the High Commission, introductive of a New Law. It gave the Queen Power, which she had not before, which power consequently ceased, when the foundation upon which it rested was taken away. For

For Commissions are not such Arbitrary things as some mistaken men fondly imagine. Though Commissioners are but Substitutes and Deputies, Persons that Act in his Name that impowers them, and execute his Authority, not their own: And how plausibly so ever it be said, that what Power a man has in him self he may delegate to another: Yet this difference must be admitted betwixt Persons commissioned by the King in matters of Government, and Persons Authorized by Private men, to act for them and in their stead; viz. That private men may by Law do those things in person, which they empower others to do for them. But the King commissions Persons to do, what himself cannot by Law do in Person: And consequently they do not receive their Authority from him only, but from the Law of the Realm, which Authorizes him to commission them, and where the Law does not empower the King to issue a Commission, he can issue none, to exercise Jurisdiction.

The Law (by which the King Reigns) has already distributed his Justice to his hands, and committed the Administration of it to the several Temporal and Spiritual Courts, the Jurisdiction of which he can neither enlarge nor abridge. Circumstances of Affairs sometimes require the issuing out of Commissions of a new, and perhaps an extraordinary nature; and the Representative Body of the Kingdom, which by the Law is to be assembled once a year in Parliament, do from time to time empower the Crown, to issue Commissions according as the case requires. All which Acts of Parliament would be needless, if His Majesty might issue Commissions at Pleasure.

The King is empowered by the Law to grant a Commission, when either an Act of Parliament warrants it, or custom immemorial, which presupposes a Law. When both fail, the Commission is illegal.

Commissioners of Oyer and Terminer, of Assize, Nisi prius, Gaol-Delivery, and the Peace, are all by virtue of Acts of Parliaments, as was the High-Commission, whilst it was in being: But the foundation thereof being taken away, this Modern one is built upon Sand; and when the wind blows, it will fall. Civil causes (where Acts of Parliament do not warrant it) cannot be determined by Commission; and yet the King is the head of the State as much as of the Church, and the fountain of Temporal as well as of Ecclesiastical Jurisdiction; and all Judges derive their Authority from him. But there is no Law for it; and therefore it cannot be.

So that I take it very clearly, that our Kings Ancient Ecclesiastical Jurisdiction was not a Personal Supremacy, separate and distinct from the States of the Realm; that it was lodged in the Crown of *England*, in the King encompassed with Peerage and Cominalty, and to be administred in the Bishops Courts, and no otherwise, but in cases of Appeals, which were to the Parliament.

But admitting that *primo Eliz.* with respect to the High-Commission were but declarative; yet it seems to me beyond all manner of scruple, that the Statute of 16 *Car. 1.* has taken away the Commission it self, Root and Branch, and not only the Power to Fine and Imprison, and minister the Oath *ex officio*. For if they had looked no farther, why the Statute of *primo Eliz.* repeal'd? In the 14th. *Paragr.* it is enacted, that no Arch-Bishop, &c. nor any Person whatsoever exercising Spiritual or Ecclesiastical Authority or Jurisdiction by any Grant, Licence or Commission of the King's Majesty, &c. shall inflict any Pain, Penalty, Fine, Amercement, Imprisonment, or other Corporal punishment, &c. This had been sufficient to disable them to Fine and Imprison. But they repeal the Branch of *primo Eliz.* and ordain, That no new Court shall be erected, which shall or may have the like Power, Jurisdiction or Authority, as the High-Commission Court then had or pretended to have. And the Stat of 13. *Car. 2. cap. 12.* which Repeals the 16 *Car. 1.* Excepts out of the Repeal, what concerns the High-Commission Court; or the New erection of such like Court by Commission: and enacts that the Branch of the Statute of *primo Eliz.* shall stand repealed.

Besides immediately upon the passing of 16 *Car. 1.* the High-Commission Court, that then was, ceas'd to Act. They did not only cease to Fine and Imprison, but they ceased to Act as a Court. Nor in the *Annas mirabilis* of 1660. at the Restitution of all things, were the High-Commissioners restor'd, but the ordinary Jurisdiction of Archbishops and Bishops, &c. being asserted, which some ambiguous words in the 16 of *Car. 1.* had rendred doubtful: They yet keep down the High-Commission Court bound by two Chains; *viz.* that of the Repeal of *primo Eliz.* and the enacting that no such like Court shall be erected by Commission. All which caution had been impertinent, if Fining and Imprisoning and ministering the Oath *ex officio*, were the only things provided against by 16 *Car. 1.* and the only things, which 13. *Car. 2. cap. 12.* designed to prevent the returning of.

You

You seem to lay a stress upon those words of 13 Car. 2. c. 12. Of any other Person or Persons, exercising Spiritual Jurisdiction by any Grant, Licence or Commission from the King. By which you say that all Ecclesiastical Authority is recognised to belong to them, the Stat. of 16 Car. 1. notwithstanding. But those words are satisfied by Commissioners of Delegates, and Commissioners to visit in places exempt, who exercise Ecclesiastical Authority by Commission from the King. So that we need not take in the High Commissioners, especially the Act providing in express terms, that there shall be none such.

Nor does that saving of the King's Supremacy in Ecclesiastical Affairs mend the matter. For it is against the nature of a *Saving*, to extend it to such things as are particularised before. It would be nonsense to enact that the King shall not grant any such Commission, saving that the King may such Commission, if he please. Rather the Makers of that Law did not look upon the granting of such a Commission, as being any part of the King's Ecclesiastical Supremacy, as indeed it was not; but a new Authority given to the Crown by *prime Elie*. Which might be taken away again without any blemish to the *Antient Legal Supremacy*.

You do not pretend to ground this present Commission upon the *prime Elie*, which confessedly stands repealed, but upon the King's Supremacy at Common Law. What power then have the Commissioners, to cite any man out of his Diocess? For it is against the 23 El. 8. cap. 9. for any Judge Spiritual so to do.

These things I offer concerning the Jurisdiction it self; in which, if you think it worth your while to give me satisfaction, you will extremely oblige

Your Friend and Servant,
Philomelos Anglicus.

FINIS.